

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES PATRICK SHARP,

Defendant-Appellant.

UNPUBLISHED

November 15, 2002

No. 234434

Macomb Circuit Court

LC No. 00-003382-FC

Before: Talbot, P.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of one count of first-degree home invasion, MCL 750.110a(2), four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(e), and one count of armed robbery, MCL 750.529. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to thirteen to twenty years' imprisonment for the home invasion conviction, and to sixty-two to ninety-six years' imprisonment for each of the criminal sexual conduct and armed robbery convictions. We affirm, but remand for correction of the judgment of sentence.

Defendant moved to suppress a confession he made following his arraignment and after he had invoked his *Miranda*¹ rights. Defendant argued that his statement was not voluntarily made and that the police interviewed him without obtaining a waiver of his *Miranda* rights. Following a *Walker*² hearing, the trial court determined that defendant had initiated the conversation with police and ruled that the confession was admissible.

Prior to his first custodial interrogation, Police Detective Dolsen advised defendant of his *Miranda* rights and defendant signed a form attesting that he had received these warnings and that he understood them. Less than a half hour into his first interrogation, defendant requested an attorney and the questioning immediately ceased. During defendant's arraignment the next day, the judge reminded defendant of his rights to an attorney. After his arraignment, defendant made a taped confession to Detective Ralston. Detective Ralston testified at the hearing that defendant expressed a desire to talk with him. Detective Ralston testified that he advised defendant to

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

² *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

speaking with an attorney prior to any conversation they may have, but that defendant declined this advice. According to the detective, defendant said that he “really, really wanted to talk” to him. In contrast, defendant testified that it was the detective who initiated the conversation that produced the confession. Defendant also denied that Detective Ralston informed him of his rights before defendant confessed.

Defendant argues that the trial court erred in denying his motion to suppress the confession. We disagree.

Once an accused invokes his Fifth Amendment rights, the police must discontinue interrogation. Interrogation cannot resume without counsel present unless the accused initiates further communication with the police. *Minnick v Mississippi*, 498 US 146, 150; 111 S Ct 486; 112 L Ed 2d 489 (1990); *Edwards v Arizona*, 451 US 477, 484-485; 101 S Ct 1880; 68 L Ed 2d 378 (1981); *People v Slocum (On Remand)*, 219 Mich App 695, 697-698; 558 NW2d 4 (1996). An accused may waive his rights to counsel through initiation of further communication with police. *Edwards, supra*; *People v Black*, 203 Mich App 428, 430; 513 NW2d 152 (1994). Where an accused chooses to initiate communications, the accused must be sufficiently aware of his Fifth and Sixth Amendment rights to make a voluntary, knowing, and intelligent waiver of such rights. *People v McElhaney*, 215 Mich App 269, 274; 545 NW2d 18 (1996).

“When reviewing a trial court’s determination of voluntariness, this Court must examine the entire record and make an independent determination.” *People v Howard*, 226 Mich App 528, 543; 575 NW2d 16 (1997). “[D]eference is given to the trial court’s assessment of the weight of the evidence and credibility of the witnesses, and the trial court’s findings will not be reversed unless they are clearly erroneous.” *Id.* Although a trial court’s findings of fact are entitled to deference, its application of constitutional standards is not entitled to deference. *People v Truong (After Remand)*, 218 Mich App 325, 334; 553 NW2d 692 (1996). We review questions of law de novo. *People v Daoud*, 462 Mich 621, 629-630; 614 NW2d 152 (2000).

After reviewing the record we are satisfied that defendant voluntarily waived his right to counsel and we find no clear error in the trial court’s finding that defendant initiated the communication with Detective Ralston. Defendant was advised of his *Miranda* rights after he was arrested and he invoked them during the first interrogation. The judge informed defendant of his right to counsel at the arraignment. Defendant testified at the hearing that he understood his rights as given to him on these two occasions. Although defendant testified to the contrary, Detective Ralston testified that defendant initiated the post-arraignment communication, and he advised defendant that he needed an attorney before speaking with him after the arraignment.

The trial court made a determination that the detective was the more credible witness and believed his version of the events. “Because the demeanor of witnesses and credibility are so vitally important to a trial court’s determination, this Court gives deference to the trial court’s credibility determination at a *Walker* hearing.” *People v Kimble*, 252 Mich App 269, 273; 651 NW2d 798 (2002), quoting *People v Snider*, 239 Mich App 393, 418; 608 NW2d 502 (2000). We discern no clear error in the trial court’s credibility determination or in its finding that defendant “brought forth the desire to continue the interrogation.” Accordingly, the trial court did not err in denying defendant’s motion to suppress his confession. *McElhaney, supra*.

Defendant next argues that he is entitled to be resentenced because the trial court erred in sentencing him to terms of sixty-two to ninety-six years for his first-degree criminal sexual conduct and armed robbery convictions. The court initially announced sentences of sixty-two to ninety-five years in prison for each count of criminal sexual conduct and armed robbery. Then the prosecutor incorrectly told the court that these sentences violate the two-thirds rule. *People v Tanner*, 387 Mich 683; 199 NW2d 202 (1972). As a result of this mistaken belief, the court increased defendant's maximum sentences to ninety-six years.

Defendant failed to object when the trial court increased his maximum terms in response to the prosecutor's erroneous statement. Thus, this issue is not preserved and we review it for plain error affecting defendant's substantial rights. *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002), citing *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

After reviewing the record, we agree that the trial court committed plain error because the sentences of sixty-two to ninety-five years originally announced by the court do not violate the two-thirds rule. This plain error affects defendant's substantial rights because the trial court added a year to his prison term. Further, the prosecutor concedes that an error was committed and that defendant is entitled to have his sentence modified. However, defendant is not entitled to resentencing. All that is necessary to correct this error is an amended judgment of sentence reflecting maximum sentences of ninety-five years.

Affirmed and remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald